known principles governing the question of the exercise of the court's discretion in allowing or refusing to allow the amendments sought.

The issue between the two defendants has yet to be tried and the application for amendment has for all practical purposes to be treated as if it was an application made during the trial. In the words of O. 28 r. 1 "all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties." It is true that the second defendant could and should have made an application to amend his defence once the first defendant had pleaded that he was claiming an indemnity against the second defendant but as it so happened the second defendant had already filed his defence before this assertion was made by the first defendant and the question of the determination of the second defendant's liability to the first defendant was thus left in abeyance until 26th March 1971.

There have been cases in which amendments alleging fraud have been allowed even at the hearing of a suit. Such cases are exceptional though. *Riding* v. *Hawkins*[1] was a case in point. There were special circumstances in that case. It might perhaps have been better, as was suggested by me when the matter came up in chambers, that the second defendant file a suit for cancellation of the agreement and then make an application for stay of proceedings of the present suits. That course has not been followed because it is suggested that it would lead only to a multiplicity of proceedings. I need not express any views on that The function of the courts is to do justice between the parties and in this particular case I find that correspondence had in fact passed between the parties as early as 1961 which suggested exactly what the second defendant now wishes to plead by amendment of his defence. There has undoubtedly been a great delay on the part of the second defendant to come to court to make the present application but that delay, it appears to me, is attributable to a somewhat false sense of security into which the second defendant had lulled himself by the fact that the question was not going to arise until after the liability of both the defendants to the plaintiffs' claim for damages was established and as this particular issue could not be finally decided until the 26th March this year, the second defendant could not realise earlier that the amendment was necessary. I am in the circumstances inclined to allow the amendment. The delay has not been due to the fault of the second defendant alone. The amendment will be allowed but only subject to the payment of costs and I like to hear counsel on that question.

Application to amend the defence of the second defendant granted.

Solicitors: *Dato' Balwant Singh & Co., W. H. Sault.*

GOH CHIN HOCK v. SHAW & SHAW LTD.

[O.C.J. (Syed Agil Barakbah J.) June 12, 1971]

[Alor Star — Civil Apeal No. 6 of 1970]

Landlord and Tenant — Recovery of possession — Relevant matters for consideration — "Reasonable to make order" — What matters to be considered — Control of Rent Act, 1966, s. 16(1)(k).

Practice and Procedure — Costs under Control of Rent Act 1966, s. 16(6) — Discretion of court.

The respondents were owners of a piece of land. The appellant was the tenant of a portion of the said land paying a ground rent of $15 per month and had erected a temporary structure on it. Subsequently the tenant enlarged and extended this structure to cover the entire portion of the land occupied by him without permission and approval of the landlord and the local authority. On account of illegal erections the respondents sued under section 16(1)(k) of the Control of Rent Act and obtained judgment for posession against which the tenant appealed.

Held: there are two requirements to be considered in construing section 16(1)(k) of the Control of Rent Act, 1966: (i) that the tenant or any person occupying the controlled premises under him has exposed the landlord to a penalty, fine or forfeiture by committing a breach of any law relating to local authorities; and (ii) the court considers that an order or judgment for possession against the tenant should be made or given; in this case as the second limb of section 16(1)(k) was not adequately considered by the sessions court and the court was silent in regard to its effect on subtenants, a retrial was ordered.

Cases referred to:-

(1) *Ho Tong Cheong & Ors.* v. *Oversea Chinese Banking Corporation Ltd.* [1969] 1 M.L.J. 129.

(2) *Yeong Peng Wah* v. *Bahal Singh* [1961] M.L.J. 316. 317.

(3) *Attorney-General* v. *Sillem* (1863) 159 E.R. 217.

(4) *Chiverton* v. *Ede* [1921] 2 K.B. 30, 44, 45, D.C.

(5) *In re Taylor* (1876) 4 Ch. D. 157, 159.

(6) *Cumming* v. *Danson* (1942) 112 L.J.K.B. 145, 147.

(7) *Kemp* v. *Ballachulish Estate Co. Ltd.* [1933] S.C. 478.

(8) *The Perak Hauliers Ltd.* v. *The Cycle & Carriage Co. Ltd.* [1962] M.L.J. 7, 13.

CIVIL APPEAL.

Karpal Singh for the appellant.

O.L. Phipps for the respondents.

Cur. Adv. Vult.

Syed Agil Barakbah J.: This is an appeal against the decision of the learned president of the sessions court at Alor Star, given on 8th December, 1969, in favour of the respondents (plaintiffs) under section 16(1)(k) of the Control of Rent Act, 1966. The order against the appellant (defendant) was to surrender possession of land comprised of Portion No. 1348 in Grant No. 23978, in the Mukim of Kota Star, situated at Jalan Raja in Alor Star town. The appellant was also ordered to demolish the temporary building situated in the said land within a period of three months and to pay the costs of the action.

The facts relevant to this appeal as accepted by the trial president are that the respondents are the owners of the land on which stands the Royal Theatre. The appellant is the tenant of a portion of the said land to the rear of the theatre paying ground rent of

$15 per month. He has been tenant of the said portion since 1942 to the former owner. Sometime that year he constructed a temporary wooden stall of about 20 feet by 30 feet and started to pay ground rent of $15 per month. When the respondents purchased the land the appellant continued to occupy the premises paying the same rent. No written agreement was executed. The area of the rented portion was not specified but only mentioned as "vacant land behind the Royal Theatre." Thereafter, the appellant from time to time extended the stall until the whole vacant land behind the theatre was entirely covered with a single storey temporary structure with zinc roof known as the "White Palace." The appellant sublet about twenty stalls to various stallholders and occupied one himself. They carried on business similar to that of a bazaar. The appellant collected rents to a total amount of $560 per month from the sub-tenants. The appellant or his sub-tenants never sought the permission of the respondents nor obtained the approval of the Alor Star Town Board and later the Town Council for the extension of the building. Several notices to give up possession of the land were issued at the instance of the respondents and served on the appellant who ignored them. The last notice was dated October, 1966. Thereafter court action commenced.

The trial president in his grounds of judgment concluded that there was ample evidence that the appellant had extended the temporary building from time to time and renovated it without the consent of the owners and the permission of the Alor Star Town Council. Illegal erections to the premises were detected by the Town Council authorities. In 1966 four illegal constructions were added. Four notices were sent by the authorities, one to the appellant for illegal erection of his own stall and the others to three of his sub-tenants. According to the record kept by the Town Council since 1960, the approved ground layout of the building was 2,524 square feet. The latest layout showed an area of 3,985 square feet to the extent of which the illegal erections were made. On those facts the trial President concluded that the appellant had exposed the respondents, the owners of the land in question, to a penalty under section 92(1) of the Town Boards Enactment (F.M.S. Cap. 137) and the fact that the respondents were never prosecuted was immaterial. He relied on the ruling of the Privy Council in *Ho Tong Cheong & Ors.* v. *Oversea Chinese Banking Corporation Ltd.*[1]

The only ground of appeal relates to the interpretation of section 16(1)(k) of the Control of Rent Act, 1966. It was submitted that in *Ho Tong Cheong's* case, *supra*, their Lordships were concerned with section 15(1)(h) of the Singapore Control of Rent Ordinance. (Cap. 242). That section is almost in *pari materia* with section 13(1)(k) of our former 1948 Ordinance which was later repealed by the 1956 Ordinance and the section was replaced by section 12(1)(k) which includes an additional clause. Subsequently the said Ordinance was repealed by the 1966 Act which also incorporates the said provision. Section 16(1) reads as follows: —

"16.(1) Except for an application made under section 18 for the recovery of possession of any controlled premises or any part thereof for the purpose of effecting or causing to be effected thereon any development, all applications for the recovery of possession of such premises or any part thereof shall be made to a Court; and no order or judgment for the recovery or possession of any controlled premises or any part thereof comprised in a tenancy shall be made or given by the Court except in any of the following cases —

(k) where the tenant or any other person occupying the controlled premises under him has committed a breach of any provision of any written law in force in the Federation relating to local authorities, or of any rule or by-law made thereunder, affecting the premises which exposes the landlord to any penalty, fine or forfeiture, and the Court considers that such order or judgment should be made or given;"

it seems to me that the words underlined are absent in the Singapore provision and did not become the subject of consideration in *Ho Tong Cheong's* case.

There are therefore two requirements to be considered in construing section 16(1)(k), namely: —

(1) that the tenant or any person occupying the controlled premises under him has exposed the landlord to a penalty, fine or forfeiture by committing a breach of any law relating to local authorities; and

(2) the court considers that an order or judgment for possession against the tenant should be made or given.

The learned president considered the first limb and, in my view, based his judgment on the correct principle with which I agree with respect. However, he failed to consider the second requirement when he gave judgment for possession in favour of the respondents. It is on the interpretation of this clause that the appeal is now concerned with.

So far there has been no decided cases locally on this issue. Mr. Karpal Singh for the appellant submitted that in the circumstances the best guide would be the English authorities based on section 3(1) of the English Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, which provides, *inter alia*, that no order for possession in respect of controlled premises may be made unless the court considers it reasonable so to do. He laid stress on the consideration of reasonableness and pointed out that in section 16(1) of our Act at least three sub-sections require the court to consider the question of reasonableness in certain specific instances, namely, paragraphs (1) (b), (d) and (m). He further urged that the glaring absence of the word "reasonable" in the second limb of the provision of section 16(1)(k) bestows upon the court a wider discretion than in the case of the three other sub-sections. Mr. Oliver Phipps for the respondents urged that the consideration of reasonableness has been purposely left out in the clause in question if compared with the other three exceptions which expressly provide such requirement.

My interpretation of the clause is that it requires the court to consider judicially whether an order or judgment for possession should be made or given. To consider judicially, according to *Stroud's* Judicial Dictionary, means to determine what is fair and just in respect of the matters under consideration. The purpose is to enable the trial president to reasonably come to his conclusion that such order should be made.

Now, it is a cardinal rule of construction that in construing any particular clause in a statute one has to look to its connection with other clauses in the same statute, and the conclusions which, on comparison with other clauses, may reasonably and obviously be drawn. If comparison of one clause with others in the statute makes a certain proposition clear and undoubted, the Act must be construed so as to make it a consistent and harmonious whole. If after all it turns out that that cannot be done, the construction that produces the greatest harmony and the least inconsistency is that which ought to prevail. (*Per* Ong J. (as he then was) in *Yeong Peng Wah* v. *Bahal Singh*[2] quoting *Attorney-General* v. *Sillom*[3]).

Looking into these paragraphs and comparing the clause in question with the other relevant clauses, it seems to me that the most appropriate and consistent construction that produces the greatest harmony is that the court has to exercise its discretion and come to its conclusion on reasonable grounds because it is incumbent upon the court to consider reasonableness when acting judicially. In *Chiverton* v. *Ede*,[4] McCardie J. quoting Jessel M.R. in *In re Taylor*,[5] said: —

" 'When I say 'the discretionary power of the judge,' I mean that, though the Act of Parliament gave the power in the most ample terms in which language could express it... yet, of course, like every other power given to a Judge, the discretion of the Judge is to be exercised on judicial grounds — not capriciously, but for substantial reasons'. I conceive, therefore, that the judge in administering the enactment must exercise the discretion which it confers upon him in a judicial manner, having regard on the one hand to the general scheme and purpose of the Act, and on the other to the special conditions, including to a large extent matters of a domestic and social character."

In my view, the court must consider whether it is reasonable that the order for possession should be made or given. The requirement of reasonableness in the clause should be construed by implication.

The next question that arises relates to the relevant factors or circumstances which the trial court has to consider having regard to section 16(1) of the Act.

Now, in *Cumming* v. *Danson*,[6] Lord Greene M.R. formulates the duties of a trial court when considering reasonableness in section 3(1) of the English Act. His Lordship says as follows: —

"In considering reasonableness, it is, in my opinion, perfectly clear that the duty of the judge is to take into account all relevant circumstances as they exist at the date of the hearing. That he must do in what I venture to call a broad, commonsense way as a man of the world, and come to his conclusion giving such weight as he thinks right to the various factors in the situation. Such factors may have little or no weight, others may be decisive, but it is quite wrong for him to exclude from his consideration matters which he ought to take into account."

A comparison should be made of section 3(1) of the English Act and section 16(1) of our Act. In the former the requirement of reasonableness which appears therein is an overriding requirement. (See *Kemp* v. *Ballachulish Estate Co. Ltd.*[7]). Apart from this there are other requirements which the court has to consider, as the case may be, such as availability of suitable alternative accommodation, certificate from the housing authority to that effect, etc. The First Schedule thereto consists of eight specific ways in which the landlord might seek remedy for possession of premises from the tenant without proof of suitable alternative accommodation.

On the other hand, in section 16(1) the requirement of reasonableness appears only in three of the exceptions and by implication in exception (k). The exceptions (a) to (m) provide thirteen separate and distinct circumstances whereby the landlord might recover possession of the premises from the tenant. (See *Yeong Peng Wah* v. *Bahal Singh, supra*). In view of this, I say with great respect that the application of the principle in *Cumming* v. *Danson, supra*, should be confined only to circumstances which are relevant to the exclusion of matters which are expressly and distinctly provided in the other exceptions, such as availability of other accommodation or of suitable alternative accommodation. This is because each exception has independent force and effect. To consider otherwise would, to my mind, involve the supposition that the legislature would have intended that the tenant by his own wrong would be in a position to bring in every conceivable factor in existence for consideration of the court. I think this interpretation fully accords with the intention of the legislature and does not raise any question of absurdity or inconsistency.

It is however difficult to formulate the actual factors to be considered because these are questions of fact some of which have been adduced in this case and some not. Nevertheless, I am of the opinion that the circumstances affecting the interests of either the landlord or the tenant of the premises, the interests of the public, the conduct of the parties and loss of goodwill of the tenant's business and for that matter that of sub-tenants, ought to be considered. Some of the considerations may be favourable to one party and some to the other. The trial president in his grounds of judgment has to a certain extent considered the conduct of the parties and other relevant facts. However, other factors pointed out above were not dealt with. Indeed, he was not in a position to do so since from what is observed in the record of the proceedings the question of reasonableness and the principles pertaining to the subject-matter of this appeal did not appear to have been brought to his attention. As a result, sufficient material facts are not available to enable this court to consider them in order to save the parties from the expense of a new trial. In the circumstances, the right course will be to allow the appeal and direct a new trial by another president in accordance with the usual practice.

The other ground is as regards the order of costs against the appellant. The trial president merely ordered the defendant to pay the costs without adhering to section 16(6) of the Act. It is settled law that when the court exercises its discretion to condemn the unsuccessful party in costs it should be made clear in the judgment that such order is made in the exercise of discretion under the proviso to the section, whether or not any reasons are given. (*The Perak Hauliers Ltd.* v. *The Cycle & Carriage Co. Ltd.*[8]). As this discretion has not been exercised, I do not think it would be proper for me to substitute my own discretion for

the trial president's. I would therefore set aside the order as to costs since the appeal is allowed for the purpose of a retrial as stated above.

The last point is that the order is silent as regards the sub-tenants who were not made parties to the action. In my view, the express provision of section 17(2) requires the trial president to declare in his judgment for possession against the tenant, whether it shall be enforceable against any sub-tenants or not. This was not done. On the contrary, the trial president made an order for the demolition of the building within three months which affects the sub-tenants. No such order was asked for in the statement of claim by the respondents in the first instance.

Appeal allowed for the purpose of a retrial.

Solicitors: *Karpal Singh & Co.; Lim Ewe Hock.*

FEDERAL FLOUR MILLS LTD. v. "TA TUNG" OWNERS & ORS.

[O.C.J. (Abdul Hamid J.) June 19, 1971]

[Kuala Lumpur — Civil Suit No. 1455 of 1966]

Shipping — Bill of lading — Cargo to be shipped in good order and condition — Cargo discharged by stevedores — Independent contractors — Charterparty — Breach of — "Vessel shall be suitable for grab discharge" — Cargo damaged — Duty of carrier to exercise due diligence — Seaworthiness — Hague Rules, Arts. III rr. 1 & 2, IV r. 2.

Shipping — Arrest of ship — Bona fide — Counterclaim for demurrage.

Negligence — Burden of proof — Charterparty — Cause of damage to cargo uncertain — Burden on shipowner to disclaim responsibility.

Practice and Procedure — Costs — "Bullock" or "Sanderson" Order.

The plaintiffs claimed damages against the first defendants, owners of the vessel "Ta Tung". Under a bill of lading dated October 18, 1966, wheat in bulk was shipped in good order and condition aboard the vessel "Ta Tung" for delivery at Port Swettenham. The plaintiffs were the owners or consignees of the cargo. It was expressly provided that all the terms condition clauses and exceptions of a charterparty dated August 31, 1966, shall be incorporated in the bill of lading. Clause 39 of the charterparty provided that the vessel was to be suitable for grab discharge. The second defendants, independent contractors, were engaged by the plaintiffs as stevedores to unload the wheat.

When discharge operations commenced, it was discovered that the wheat grain had been contaminated with diesel oil. The plaintiffs alleged that there was a breach of clause 39 of the charterparty as the ship "Ta Tung" was not suitable for grab discharge, and that there was a breach of Article III rules 1 and 2 in the Schedule to the Australian Sea-Carriage of Goods Act, 1924 (Hague Rules), when the shipowners failed to make the ship seaworthy.

Held: (1) there was no evidence to show that the leakage of diesel oil had resulted from the damage caused by the grab used in unloading by the second defendants and therefore the second defendants were not liable;

(2) the onus was on the shipowners to show that they had exercised due diligence to see that the ship was seaworthy. On the facts the shipowners had failed to prove that they had exercised due diligence to see that the ship was seaworthy and they were therefore liable to pay the plaintiff's claim;

(3) Where the precise cause of the damage to the goods was uncertain the burden was on the shipowner to show that the cause was not one for which he was responsible;

(4) the shipowners were not entitled to succeed in their counterclaim for demurrage as the plaintiffs acted *bona fide* when they arrested the ship.

Observations on the appropriateness of a *Bullock* order as opposed to a *Sanderson* order for costs.

Cases referred to:-

(1) *Ballantyne & Co. Pursuers* v. *Paton and Hendry* (1912) S.C. 256.

(2) *Blaikie & Ors.* v. *Stembridge* 141 E.R. 703.

(3) *Sack* v. *Ford* 143 E.R. 36.

(4) *Pendle & Rivett Ltd.* v. *Ellerman Lines Ltd.* 29 Ll. L. R. 133 at p. 136.

(5) *Albacora S.R.L.* v. *Wescott & Laurance Line Ltd.* [1966] 2 Ll. R. 58.

(6) *F. C. Bradley & Sons Ltd.* v. *Federal Steam Navigation Co. Ltd.* 27 Ll. L. R. 395.

(7) *Walter Turnbull & Ors.* v. *The Owners of the Ship "Strathnaver* (1875) 1 App. Cas. 58.

(8) *Mayer* v. *Harte & Ors.* [1960] 2 All E.R. 840.

CIVIL SUIT.

K. A. O'Connor (*M. Shanker* with him) for the plaintiffs.

M. Karthigesu (*R. C. Hoffman* with him) for the first defendants.

J. J. Puthucheary (*Abdullah Yusoff* with him) for the second defendants.

Cur. Adv. Vult.

Abdul Hamid J.: This is a claim by the Federal Flour Mills Limited against the owners of the vessel "Ta Tung" of the Port of Panama for the sum of $169,291.34, interest at 6% per annum from 11th November, 1966 up to the date of realization and costs or in the alternative against the Cargo Handling Corporation or both or all of them for damage sustained by the plaintiffs by reason of the contamination of the wheat by diesel oil.

Under a bill of lading dated 18th October, 1966, 7,773 tons 8 cwts. and 2 qrs. of wheat in bulk were shipped in good order and condition aboard the vessel "Ta Tung" for delivery at Port Swettenham. The plaintiffs were the owners or consignees of the cargo. It was the duty of the first defendants to deliver by the said bill of lading wheat in the same good order and condition as that in which it was shipped. It was expressly provided that all the terms, condition clauses and exceptions of a charterparty dated 31st August, 1966 (made between the first defendants as owners and William Charlick Limited as charterers) shall be incorporated in the bill of lading. Clause 39 of the charterparty provided that the vessel shall be suitable for grab discharge.

The ship sailed on 19th October, 1966 and arrived at Port Swettenham on 2nd November, 1966. Notice of readiness (AB1 p. 14) was tendered to Mr. Sansom (PW 1) the manager of Federal Flour Mills Limited on 3rd November, 1966 and was ready to commence discharging cargo in accordance with the terms and conditions of the charterparty.